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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 PHILLIP SOLIDAY,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 14-cv-05091 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
19 Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United
20 States Magistrate Judge, ECF No. 6). This matter has been fully briefed (*see* ECF Nos.
21 12, 13, 14).

22 After considering and reviewing the record, the Court concludes that the ALJ
23 failed to evaluate plaintiff's alleged shoulder impairment due to an unsupported finding
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1 that this impairment did not arise before plaintiff's last date insured. This impairment was
2 diagnosed by a physician following examination prior to plaintiff's date last insured and
3 the medical evidence supports allegations of limitations arising from this impairment.
4 Hence, plaintiff's alleged shoulder impairment should be assessed in the first instance by
5 the Administration.

6 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
7 U.S.C. § 405(g) to the Acting Commissioner for further consideration.

8 BACKGROUND

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10 Plaintiff, PHILLIP SOLIDAY, was born in 1959 and was 49 years old on the
11 alleged date of disability onset of August 28, 2008 (*see* Tr. 147-48). Plaintiff finished
12 high school has attended some college (Tr. 46). Plaintiff has work experience as a
13 carpenter in residential construction, a part-time crew member in a grocery store, a
14 service advisor in an auto dealership and an inside salesman at a lumber yard. He also
15 owned a siding construction company (Tr. 188-194).

16 According to the ALJ, through the date last insured, plaintiff had at least the
17 severe impairments of "status-post carpal tunnel release, [and] bipolar disorder (10 CFR
18 404.1520(c))" (Tr. 20).

19 At the time of the hearing, plaintiff was living with his girlfriend and two of his
20 four sons in a single family home (Tr. 44, 47).

21 PROCEDURAL HISTORY

22
23 Plaintiff's application for disability insurance ("DIB") benefits pursuant to 42
24 U.S.C. § 423 (Title II) was denied initially and following reconsideration (*see* Tr. 74-85,

87-98, 100-102, 108-112). Plaintiff's requested hearing was held before Administrative Law Judge Scott R. Morris ("the ALJ") on June 5, 2012 (*see* Tr. 35-73). On August 28, 2012, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* Tr.15-33).

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the Commissioner err in determining plaintiff's severe impairments; (2) Did the Commissioner err in determining that plaintiff did not meet or equal any of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 §1.04; (3) Did the commissioner err in evaluating plaintiff's credibility; and (4) Did the Commissioner err in determining plaintiff's residual functional capacity (*see* ECF No. 12, p. 2).

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

(1) Did the Commissioner err in determining plaintiff's severe impairments?

Among other contentions, plaintiff contends that the ALJ erred at step two when he failed to analyze plaintiff's shoulder impairment due to a finding that plaintiff's

1 “impairments involving his shoulder arose after the date of last insurance” (*see*
2 Tr. 21).

3 Step-two of the administration’s evaluation process requires the ALJ to determine
4 if the claimant “has a medically severe impairment or combination of impairments.”
5 *Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). “An impairment or combination of
7 impairments can be found ‘not severe’ only if the evidence establishes a slight
8 abnormality that has ‘no more than a minimal effect on an individual[’]s ability to
9 work.’” *Smolen, supra*, 80 F.3d at 1290 (*quoting* Social Security Ruling “SSR” 85-28)
10 (*citing Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)).
11

12 Although the ALJ found that plaintiff’s “impairments involving his shoulder
13 . arose after the date of last insurance,” December 31, 2011, the record does not
14 substantiate this finding (*see* Tr. 20, 21). On September 1, 2010, plaintiff was diagnosed
15 with joint pain in his shoulder, with a reported pain of 5/10 (*see* Tr. 397). On September
16 7, 2010, less than a week later, plaintiff again was seen for pain in his shoulder, which he
17 reported at a level of 7/10 (*see* Tr. 404). Importantly, following examination on
18 September 14, 2010, Dr. Douglas M. Hassan, M.D. observed that plaintiff’s “shoulder
19 impingement sign is positive” and he approved additional treatment for plaintiff’s
20 shoulder pain (*see* Tr. 495). On September 22, 2010, plaintiff again was assessed with
21 cervicalgia and joint pain in his shoulder, and he reported “constant” pain after being in a
22 motor vehicle accident earlier in the month (*see* Tr. 422). Similarly, on September 29,
23 2010, plaintiff reported pain and was observed to have “moderate – severe hypertonicity
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1 [in his] rhomboids, trapezius, levator, SCM, scalene and suboccipital ligaments” (*see* Tr.
2 438). On October 6, 2010, plaintiff reported that his shoulder pain had been getting
3 better, but that he was suffering from pain in his right shoulder when he abducts his arms
4 such that both hands are above his head (*see* Tr. 450). On October 26, 2010, Dr. Hassan
5 reported that plaintiff had experienced moderate improvement following a right shoulder
6 injection, but that his “right shoulder impingement sign still remains moderately positive”
7 (*see* Tr. 492).

8
9 Therefore, defendant’s arguments that the ALJ did not need to consider the
10 shoulder impairment is not persuasive. Any contention that the impairment was not
11 substantiated is unpersuasive, as a physician twice diagnosed an impairment following
12 examination (*see* Tr. 492, 495).

13 Although defendant argues that the ALJ properly could have failed to credit the
14 severity of the resultant limitations because they derive mainly from plaintiff’s own
15 subjective reports, such reasoning was not promulgated by the ALJ and according to the
16 Ninth Circuit, “[l]ong-standing principles of administrative law require us to review the
17 ALJ’s decision based on the reasoning and actual findings offered by the ALJ - - not *post*
18 *hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking.”
19 *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (*citing SEC v. Chenery*
20 *Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted)). Besides, it is clear here what
21 the ALJ was thinking, and such thinking was incorrect.

22
23 For the stated reasons and based on the record, the Court concludes that the ALJ’s
24 finding that plaintiff’s “impairments involving his shoulder arose after the date of

1 last insurance” is a finding that is not based on substantial evidence in the record as a
2 whole (*see* Tr. 21). The Court also concludes that this error is not harmless, as it is not
3 inconsequential to the ultimate disability determination. *See Molina v. Astrue*, 674 F.3d
4 1104, 1115 (9th Cir. 2012) (the Ninth Circuit has “adhered to the general principle that an
5 ALJ’s error is harmless where it is ‘inconsequential to the ultimate nondisability
6 determination’”) (*quoting Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1162
7 (9th Cir. 2008)) (other citations omitted); *see also Shinsheki v. Sanders*, 556 U.S. 396,
8 407 (2009) (*quoting* 28 U.S.C. § 2111) (codification of the harmless error rule)).
9

10 The ALJ made no effort to analyze plaintiff’s alleged shoulder impairment and did
11 not determine if any further accommodation was warranted into plaintiff’s RFC, such as
12 limitation to overhead reaching or further limitation on lifting or climbing ladders. This is
13 something for the ALJ to determine in the first instance.

14 The Court also notes that in the context of this case, the evidence supporting
15 plaintiff’s alleged shoulder impairment is significant, probative evidence that the ALJ
16 erred in failing to discuss. *See Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (the
17 Commissioner “may not reject ‘significant probative evidence’ without explanation”)
18 (*quoting Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (*quoting Cotter v.*
19 *Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981))).
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1 (2) **Did the Commissioner err at step three in determining that plaintiff**
2 **did not meet or equal any of the listed impairments in 20 C.F.R. Part**
3 **404, Subpart P, Appendix 1 §1.04?**

4 The Court already has concluded that the ALJ erred in reviewing the medical
5 evidence at step two of the sequential disability evaluation and that this matter should be
6 reversed and remanded for further consideration, *see supra*, section 1. Therefore, as a
7 necessity, step three should be assessed anew following remand of this matter.

8 (3) **Did the commissioner err in evaluating plaintiff's credibility?**

9 The Court already has concluded that the ALJ erred in reviewing the medical
10 evidence and that this matter should be reversed and remanded for further consideration,
11 *see supra*, section 1. In addition, a determination of a claimant's credibility relies in part
12 on the assessment of the medical evidence. *See* 20 C.F.R. § 404.1529(c). Therefore, for
13 this reason, plaintiff's credibility should be assessed anew following remand of this
14 matter.

15
16 (4) **Whether this matter should be reversed and remanded with a direction**
17 **to award benefits, or for further administrative proceedings.**

18 Generally when the Social Security Administration does not determine a
19 claimant's application properly, "the proper course, except in rare circumstances, is
20 to remand to the agency for additional investigation or explanation." *Benecke v.*
21 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth
22 Circuit has put forth a "test for determining when [improperly rejected] evidence
23 should be credited and an immediate award of benefits directed." *Harman v. Apfel*,

211 F.3d 1172, 1178 (9th Cir. 2000) (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). It is appropriate when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Harman, supra, 211 F.3d at 1178 (*quoting Smolen, supra*, 80 F.3d at 1292).

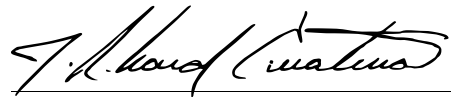
Here, it is not clear from the record that the ALJ would be required to find plaintiff disabled were the inappropriately discredited evidence credited in full. The ALJ failed in the first instance to evaluate plaintiff's testimony and the medical evidence regarding plaintiff's alleged shoulder impairment. This is the ALJ's responsibility.

CONCLUSION

Based on the stated reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration.

JUDGMENT should be for plaintiff and the case should be closed.

Dated this 30th day of July, 2014.



J. Richard Creatura
United States Magistrate Judge